

**In Home Health, Inc. and International Longshoremen's Association, AFL-CIO.** Case 5-CA-29110

June 8, 2001

**DECISION AND ORDER**

**BY CHAIRMAN HURTGEN AND MEMBERS  
TRUESDALE  
AND WALSH**

On April 2, 2001, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, In Home Health, Inc., Minnetonka, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT announce and grant our employees a wage increase to dissuade them from supporting the International Longshoremen's Association, AFL-CIO pro-

<sup>1</sup> No exceptions have been filed to the judge's findings that Respondent violated Sec. 8(a)(1).

vided, however, nothing shall be construed as requiring us to rescind any wage increase we previously granted.

WE WILL NOT threaten our employees with job loss if the Union calls an economic strike at our facilities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed our employees by Section 7 of the Act.

**IN HOME HEALTH, INC.**

*John S. Ferrer, Esq.*, for the General Counsel.

*Patrick R. Scully, Esq. (Sherman & Howard, L. L. C.; Robert J. Deeny, Esq.*, on the brief), of Denver, Colorado, for the Respondent.

*Herzl S. Eisenstadt, Esq. (Gleason & Matthews, P.C.)*, of New York, New York, for the Charging Party.

**DECISION**

**FINDINGS OF FACT**

BENJAMIN SCHLESINGER, Administrative Law Judge. Shortly after Charging Party International Longshoremen's Association, AFL-CIO (Union), filed its petition for an election, Respondent In Home Health, Inc. increased the hourly wages of its certified nurses assistants (CNAs).<sup>1</sup> That increase was granted, the complaint alleges, in order to influence their votes and affect the results of the upcoming Board-conducted election, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.<sup>2</sup> Respondent denies that it violated the Act in any manner.

Respondent, a Minnesota corporation based in Minnetonka, is a national home health and hospice company providing services in 15 States from 39 locations, including those involved in this proceeding, Virginia Beach and Suffolk, Virginia. During the year ending October 17, 2000,<sup>3</sup> Respondent derived gross revenues in excess of \$100,000 and performed services valued in excess of \$5000 directly to customers outside Virginia. I conclude that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On June 29, the Union mailed to the Regional Office for Region 5, with a copy to Respondent, a petition for certification (Case 5-RC-15051) of a unit of CNAs dispatched from Re-

<sup>1</sup> The functions of the CNA, who is certified by the Commonwealth of Virginia, was described by one witness as follows: "To go out and do personal care to the clients, wherever they may be—their home, hospitals, facilities—bathe them, dress them, to assist with their medication. We're dealing with combative, Alzheimer's, AIDs, hospice. To make sure that they're safe and do what they need to do for them as far as personal care, shop for them, feed them."

<sup>2</sup> The relevant docket entries are: The charge was filed on July 20 and the complaint was issued October 17, 2000. This case was tried in Virginia Beach, Virginia, on February 22, 2001.

<sup>3</sup> All dates are in 2000 unless otherwise stated.

spondent's two Virginia offices. It was received by the Regional Office on July 3.<sup>4</sup> It probably arrived at Respondent's office no later than the same day, but certainly by July 5. Shortly after, on July 10, Phyllis Moran, Respondent's director of operations for the two Virginia offices, issued the following notice to all of Respondent's CNAs and companions<sup>5</sup> (collectively, home health aides):

WE HAVE RECEIVED A PETITION FROM THE NATIONAL LABOR RELATIONS BOARD FILED BY THE LONGSHOREMEN'S UNION. THE PETITION REQUESTS A GOVERNMENT-SUPERVISED ELECTION TO DETERMINE IF THE LONGSHOREMEN WILL REPRESENT YOU. IN OTHER WORDS, THE LONGSHOREMEN WANT TO SPEAK *FOR ALL OF YOU* WHEN IT COMES TO DECISIONS ABOUT YOUR WAGES, HOURS AND CONDITIONS OF EMPLOYMENT. IN ORDER TO FILE THIS PETITION, THE UNION HAD TO SHOW THE GOVERNMENT THAT AT LEAST 1/3 OF YOU SIGNED A CARD THAT SAID YOU WANTED TO BE REPRESENTED BY THE LONGSHOREMEN.

WE WANT TO ASSURE YOU THAT WE WILL DO EVERYTHING LEGALLY IN OUR POWER TO OPPOSE THE UNION. PUT SIMPLY, WE THINK THE UNION IS A BAD IDEA, AND A BAD DEAL FOR OUR EMPLOYEES. WE KNOW THAT THE GREATER MAJORITY SUPPORT US IN THESE Views.

SEVERAL WEEKS AGO I RECEIVED AUTHORIZATION TO MAKE A MARKET ADJUSTMENT TO WAGES. I HAVE BEEN IN THE PROCESS OF IMPLEMENTING THAT ADJUSTMENT. I WILL CONTINUE THIS PROCESS AS PART OF OUR COMMITMENT TO REMAIN COMPETITIVE. I WILL ADDRESS MARKET CONDITIONS, AS NECESSARY, AND I HOPE YOU WILL GIVE ME THAT CHANCE WITHOUT THE INTERFERENCE OF THIS THIRD PARTY.

WE WILL BE TALKING TO YOU IN THE COMING WEEKS ABOUT THINGS YOU SHOULD KNOW ABOUT UNIONS AND ABOUT THIS UNION IN PARTICULAR—SO STAY TUNED. IN THE MEANTIME, DON'T LET ANYONE PUSH YOU INTO A BAD DEAL. REMEMBER, YOU HAVE THE RIGHT TO REVOKE A CARD IF YOU SIGNED ONE, AND IF YOU HAVE NOT SIGNED ONE, YOU HAVE THE RIGHT TO TELL THE UNION SALESMAN YOU ARE NOT INTERESTED.

Three days later, on July 13, Evelyn Dennis, the extended hours division supervisor, announced to the home health aides that the "market adjustment" of wages had been completed, that the

new pay rates were effective as of July 1, and that the employees would see the increase in their paychecks of July 17.<sup>6</sup>

Moran testified that she attended a meeting of the Virginia Association of Home Care in May, where she first learned that the Commonwealth had approved an increase in the amount of medicaid personal care assistant (PCA) rate of reimbursement for client services from \$9.50 to \$10.25. She then verified with the department of medical assistance services that this increase would be paid on July 1. On June 6 she held a business development meeting with all her supervisors and reported on her business referral program, noting that she was receiving referrals from prospective clients but had no staff to fill all of the jobs and that she was concerned with the loss of business. Her notes from that meeting with Dennis, who was serving her second day of employment and was attending her first meeting, and Michelle Mankowski, whom Dennis was hired to replace, reveal a discussion of the facts that "re availability of CNA for assignment—recruiting is down—We'll be discussing wages—PCA rate to ↑ [increase] 070100 comments from CAN—our wage scale is low."

At another meeting with Dennis and Mankowski the following day, she discussed the need to increase the wages of the CNAs who serviced both private duty clients, those who were covered by private insurance, and clients who were paid by medicaid PCA reimbursement, a decision which she then made and was to relay to Lisa Weber, Respondent's corporate vice president of operations at its corporate office in Minnesota. Her notes corroborate this, too. They indicate that she renewed the need for the salary adjustment, which she testified was a result of "information that we had received regarding our wages" and "in order to stay competitive and to be able to attract and retain CNAs." On June 12 Moran held a profit-and-loss telephone conference call with Weber, in which Moran recommended that she give her employees who worked for private clients (extended hours) 35 cents per hour and 50 cents for those reimbursed for medicaid, "because many of the aids [sic] worked in the same departments, and our extended hours rate was also lower than what most of the other agencies in town were paying so we felt that this was the opportune time to go ahead and do an across-the board rate adjustment." Moran testified that the increase was to be effective July 1 and that Weber agreed. Moran's notes appear to corroborate her testimony. They state: "Recommend 35¢/hr for true [?] EH—50¢ for PCA effect 070100—OK for this." From Weber's notes of the same meeting, there is a reflection that recruitment and retention of extended hours employees remained a major problem and that "PCA rate to \$11.25 eff 7/1 (↑ \$.75) Will ↑ pay rates."

Notwithstanding Moran's testimony that she was disposed to grant an increase, there was some evidence to indicate Moran's less than enthusiastic support for a pay raise. When the PCA rate increase was announced in May, Regina Darden, Respondent's staffing coordinator who assigned CNAs to their jobs and did their payroll, asked Mankowski for an increase for the

<sup>4</sup> The election was held on September 7, but the results were inconclusive.

<sup>5</sup> A companion was described by one witness as "someone who cannot administer hands on care, cannot give a bath. They're just there to assist, to sit like a babysitter or to run errands and to do light house-keeping." The five companions whom Respondent employed in July were not included in the petitioned-for unit.

<sup>6</sup> Respondent granted increases to all its CNAs and five companions. As the General Counsel points out in his brief, apparently the amounts of the increases were not consistent, but generally were within a few cents of the amounts stated in this decision.

employees. Mankowski said she would find out and returned shortly with the response from Moran that employees would be given a raise only if they asked for it, to which Darden replied, as corroborated by human resources employee Bradenea Henderson, "What kind of shit is that?" Moran's answer was not that of one who was anxious to increase the wage rate of the CNAs to ensure that Respondent was not losing business to its competitors. Mankowski, no longer employed by Respondent, did not testify, and the record is silent about her whereabouts.

Moran never denied that this incident happened: Respondent, nonetheless, attacks the testimony on two grounds: First, Respondent contends that the General Counsel and the Union had the power to subpoena Mankowski to testify, that they did not, and that their failure to do so required an inference that she would not have supported Darden's testimony. However, Mankowski was Respondent's supervisor; and if anyone should have elicited her testimony, it was Respondent. Second, Respondent contends that Darden was prejudiced because she was forced to resign involuntarily, had filed (unsuccessfully) an unfair labor practice charge against Respondent, and had hired an attorney to sue Respondent. However, none of her testimony was shown to be false and little was even contradicted, including the statement that she attributed to Mankowski, which was corroborated by Henderson.

Ordinarily, I would take into consideration, in determining Moran's credibility, the fact that she had left Respondent's employ 2 months before the hearing. She would have little to gain from her testimony and no reason to fabricate. However, this proceeding started long before she left Respondent's employ, and she had already prepared the defense, so she was bound by what she earlier did to defend against the issuance of the complaint. One incident to which she testified made no sense at all. Moran testified about the June 6 meeting:

I specifically recall the day I met with Michelle and Evelyn on the 6th that when I completed that meeting as I left their office I went around and I spoke to the staffing coordinator at that time and said to her I'm excited because I feel we'll be able to put in a wage adjustment that will certainly help with recruitment and retention.

Darden denied that Moran had told her anything of the sort. The reason for Moran's excitement was unclear, especially because there had been no corporate approval of her request and the issue had not even been raised with Weber. I believe Darden's denial and find that the event to which Moran testified did not happen and was fabricated. If she made up that incident, is it possible that she made up others, too? Her handwritten notes of June 12, quoted above, are of particular concern. Whereas almost all her writing was on the lines of the page, only one line was not, the line that stated "OK for this," which was between two lines. I find that this must have been inserted during the investigation of the unfair labor practice charge; and it is equally probable that she, in order to bolster Respondent's case, also inserted "effect 070100" on the previous line.

Indeed, Weber admitted that her notes did not reflect that there was any intent to coordinate the effective date of the wage increase with the effective date of the PCA reimbursement rate

increase. And, other than "effect 070100" in Moran's notes, Respondent made no showing that any date was established for the increase prior to Respondent's receipt of the Union's petition. That would be consistent with the fact that, despite the purported loss of business and Moran's desire for help with recruitment and retention of CNAs, Respondent did nothing. Respondent counters with Moran's testimony that immediately after Weber approved the increase on June 12, (Moran) told Dennis to put it into effect. Yet Dennis, although called to testify, was never asked what she did in June to effectuate the increase. Rather, absolutely nothing appears to have been done. Clearly, there was no explanation of why Dennis had been unable to complete in June the administrative tasks necessary to increase the pay of the employees for the first payroll in July.

Dennis did not sign the payroll change forms that had to be completed for the wage increase until July 10; and, although Moran testified that she directed Dennis to handle these tasks about June 12, as of July 5, she had not followed up on what Dennis had done due to the fact that Moran "was orienting another supervisor in another department, so [she] really did not know whether or not all of those forms had been completed." That could not have prevented her from asking Dennis during all of June how she was proceeding with the rate increase. And Dennis made no showing of what she did to implement the decision to increase the wages other than to show what she did beginning July 10. To Respondent's contention that the supervisory staff for extended hours had been reduced to two persons, one very recent, Respondent still could have directed Darden to perform the basically computer-oriented work, Moran though would take about 4 of 5 hours and Henderson estimated would take only 2.

All there is in this record is Respondent's ipse dixit that, at least as of the beginning of July, it could not have implemented the increase. According to Moran, she was sick on July 3, the office was closed for the holiday of July 4, and she did not return to the office until Wednesday, July 5. Even after her return, however, no effort was made to begin inputting the new wage increase into the payroll system. Moran attempted to excuse her lack of effort on the ground that it would have taken too long to program the wage increases, even though she admitted that she could still submit the figures by the end of that Wednesday. But Darden's and Henderson's testimony demonstrated that the changes could have been made timely.

Moran and Dennis claimed that employees were made aware of the wage increase prior to the July 10 notice because employees were told of it when they picked up their checks at the office, but neither Moran nor Dennis had direct knowledge of the truth of their assertions. Respondent called not one employee witness to corroborate that he or she was informed of the increase prior to July 10. Moran's claim that she announced at a staff meeting on June 20 that the wage increase would be in effect on July 1 is also suspect. Whereas Respondent supported the contentions that it wished to make with documents, such as notes and weekly planners, Respondent did not corroborate Moran's testimony with her notes of or the weekly planner from that meeting, or even the sign-in sheet, to prove that Darden was present, which came from the same books as other exhibits that Respondent produced at the hearing. Darden, the

only employee who had personal, daily contact with the CNAs, for whom she did the payroll, credibly testified that she was never told by anyone that the employees were going to be given increases effective on July 1. Finally, it was only on July 10, after the Union filed its representation petition that Moran issued a public, written statement about the wage increase. She did not issue one before, despite her purported excitement on June 12 that “we’ll be able to put in a wage adjustment that will certainly help with recruitment and retention.” Nor did she put that increase in effect earlier in order to help recruitment and prevent CNAs from leaving Respondent’s employ. In short, I do not believe Respondent’s explanation and find that there was no prior commitment to raise the wages of the CNAs on July 1.

The General Counsel contends that Respondent never even decided on any wage increase at any time, accurately pointing out that Respondent offered no documentation, such as a market or employee survey, to support its rationale that other competitors were paying more than it was and that there truly was a loss of employees to its competitors. There was no documentary evidence that Respondent was attempting to approach parity with the wage rates that other local agencies were providing, because there was no proof of what those agencies were paying. Respondent failed to provide any newspaper ads to confirm its recruiting efforts. There was no concrete showing that Respondent turned aside any referral because of lack of staffing. All Respondent showed was that its gross revenues from its extended hours division had declined, but it did not show the reasons for the decline. Darden asked her superiors in May and June to give the employees more money, but the answer was always “no.” Furthermore, Respondent had no past practice of granting a market adjustment wage increase or of granting a wage increase based on an increase in the PCA reimbursement rate despite Moran’s and Weber’s testimony that Respondent had previously granted a general increase to employees. I found their testimony vague and unsupported by specifics. At best, there may have been an increase when Federal minimum wage increases required them. Otherwise, some employees were rewarded based on their yearly evaluations. Others, such as CNA Chrystal Wilson, who was first employed in 1992, had never before received an increase.

Despite these meritorious arguments, and despite my finding that Moran altered her notes to reflect that the increase was going to be made on July 1, which causes me to discredit the similar testimony of Weber, there is no other hint in the record that their notes were otherwise falsified or prepared specifically to support Respondent’s defense to the complaint in this proceeding. I conclude that they did talk about an increase and determined that there should be one in the future, but they had not decided on the date to implement the decision. And Moran had not implemented the decision by the time she received the petition. It was only when she did that Respondent found it imperative to announce the increase, which was clearly linked to the employees’ union activities and Respondent’s desire to remain nonunion, and start working on its implementation. In granting the increase then, Respondent did so in order to affect the results of any impending election and even, as its notice stated, to convince employees not to sign union cards and to revoke them, in violation of Section 8(a)(1) of the Act. *NLRB*

*v. Exchange Parts Co.*, 375 U.S. 405 (1964). The Board appears to find this also a violation of Section 8(a)(3). *Cooper Industries*, 328 NLRB 145 fn. 4 (1999). But see *Perdue Farms v. NLRB*, 144 F.3d 830, 833 (D.C. Cir. 1998), refusing to enforce in relevant part 323 NLRB 345, 352 (1997). I find it unnecessary to determine this issue, because the remedy for the additional violation is the same.

There is one other unfair labor practice allegation in the complaint.<sup>7</sup> In a flyer entitled “IF THE UNION WINS, YOU COULD LOSE!!,” Respondent made the following statement: “YOU COULD LOSE YOUR JOB, if the Union called an economic strike and the Company hired replacement workers to fill your job.” The Board has “made it clear that employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement.” An employer must convey to employees that they would have recall rights in the event of a strike under *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1969). *Baddour, Inc.*, 303 NLRB 275 (1991). The phrase “lose your job” conveys to the ordinary employee the clear message that employment will be terminated. Respondent contends that the flyer was never distributed to any employees. The testimony of Wilson, albeit internally inconsistent and contradictory, was sufficient to prove that the leaflet was distributed by Respondent, either by hand or mailed, a fact never denied by any of Respondent’s witnesses. Accordingly, by threatening loss of jobs, Respondent violated Section 8(a)(1) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The General Counsel requests that the notice be mailed to all the employees, because the CNAs do not work at Respondent’s facilities but typically at the client’s home or a hospital. However, most go to Respondent’s Virginia Beach facility on Mondays to be paid and then on those days or other days pick up necessary supplies or paperwork. Accordingly, they have sufficient opportunity to read the notice without the unusual relief of forcing Respondent to mail it to all employees. *Madison Detective Bureau, Inc.*, 250 NLRB 398, 401–402 (1980), relied on by the General Counsel, is distinguishable. The employees did not report at all to the respondent’s headquarters.

On these findings of fact and conclusions of law and on the entire record,<sup>8</sup> including my observation of the witnesses as

<sup>7</sup> Respondent, once again relying on *Ross Stores, Inc. v. NLRB*, 235 F.3d 669 (D.C. Cir. 2001), urges that this allegation, which resulted from an amendment made during the hearing, be dismissed. With due respect to the court’s decision, I am bound by Board law, which holds that “the requisite factual relationship under the ‘closely related’ test may be based on acts that arise out of the same antiunion campaign.” *Office Depot*, 330 NLRB 640 (2000).

<sup>8</sup> The General Counsel moves to amend various portions of the official transcript. The motion is granted only to the following extent: On p. 37, L. 11, “I’ll join” shall read “I will not join.” On p. 200, L. 19, “July 15th” shall read “July 5th.”

they testified and the briefs submitted by the General Counsel and Respondent, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondent, In Home Health, Inc., Minnetonka, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing and granting its employees a wage increase to dissuade them from supporting the International Longshoremen's Association, AFL-CIO (Union), provided, however, nothing here shall be construed as requiring In Home Health, Inc. to rescind any wage increase it previously granted.

(b) Threatening its employees with job loss if the Union called an economic strike at its facilities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Virginia Beach, Virginia and Suffolk, Virginia facilities copies

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<sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 10, 2000.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

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<sup>10</sup> If this Order is enforced by a judgment of the United States court of appeals, the words in the notice "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."